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IN THE

Supreme Court of the United States

OCTOBER TERM, 1962

No. 233

EDWIN A. KAAKINEN AND KAAKINEN FISH COMPANY,

Petitioners,

vs.

THE PEELERS COMPANY,

Respondent.

RESPONDENT'S BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

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This case comes before this Court on a petition by Edwin A. Kaakinen and Kaakinen Fish Company, defendants below, for a writ of certiorari to review the judgment of the United States Court of Appeals for the Ninth Circuit.

OPINIONS BELOW

The citations to the District and Circuit Court opinions are correctly set forth in the Petition. The findings of fact and conclusions of law of the District Court are reproduced in the Appendix hereto.[1]

JURISDICTION

The jurisdictional requisites are adequately set forth in the Petition.

[1]Such Appendix will be hereinafter designated Res. App. p.

STATEMENT

No one of petitioners' "Questions" (Pet. 2-3) state an issue or a question presented by or supportable in this case. The actual issues are revealed in the 52 findings of fact and the conclusions of law of the District Court, which findings and conclusions were, in all respects, upheld by the Court of Appeals. These findings and conclusions are of the essence and, as mentioned earlier, are reproduced in the Appendix hereto.

Petitioners' statement (Pet. 3-9) and those portions of their later argument which purport to state facts are so lacking in clarity and accuracy through omission of facts material to the issues as presented and decided below and by the inclusion of argumentative assertions as a substitute for fact as to require restatement and amplification of the material facts herein.

This is a routine case between private parties under the patent statutes involving the usual questions of validity and infringement. Specified claims of three patents relating to shrimp peeling mechines are in suit (Finding 2; Res. App. p. 1a). All of these claims define new combinations of old mechanical elements (Finding 9; Res. App. p. 3a). Infringement was admitted as to patent '828[1] but otherwise denied. Petitioners withdrew, before trial, a defense of anticipation under 35 U. S. C. 102, thereby admitting that the claimed combinations were new combinations, a finding specifically reached on the evidence by the District Court (Finding 45; Res. App. p. 15a). Validity of all claims was questioned under 35 U. S. C. 103, petitioners relying upon combinational permutations of some 36 prior art patents (Finding 47; Res. App. p. 16a).

[1]The patents in suit will be designated by their last three numbers in conformity with the designations thereof employed below.

As will be apparent from the following discussion of each question, petitioners' questions are artificial and are not questions that can be properly considered on the findings and conclusions of this case.

As to Question 1 (Pet. 2)

Petitioners' first Question is, in essence, based upon three argumentative and incorrect assumptions. The first of these assumptions is that the determination of invention, and of infringement, was each based ". . . solely on the success and operation of a commercial machine of the patent owner . . .". The erroneous nature of this assumption, either as to validity or as to infringement, is apparent from the actual findings.

As to the basis for its conclusion that the asserted claims were valid and definitive of patentable invention, the District Court specifically found that the asserted claims were directed to new combinations of old elements (Finding 9; Res. App. p. 3a). The Court further found that these new combinations produced new functions and new results (Finding 24; Res. App. p. 7a); that the "new combinations covered by the patent claims" succeeded in the peeling of shrimp in contradistinction to previous failures and that such "new combinations covered by the patent claims" provided a solution to a problem of long standing in the art (Findings 22, 23, 16; Res. App. pp. 7a, 5a). These findings reveal positively that the Court was concerned with the "new combinations" and not with respondent's machines.

Even when finding as to the effect that the respondent's machines had upon the practical art, the Court carefully related the same to the presence of the new combinations in such machines, expressly finding that the respondents machines contained the new combinations of the asserted patent claims (Finding 19; Res. App. p. 6a). Thus the Court

found that "shrimp peeling machines embodying these inventions" were the first to successfully effect the automatic bulk peeling of shrimp (Finding 9; Res. App. p. 3a); that such machines have had a rapid and widespread acceptance and have virtually eliminated the inefficient and expensive hand peeling of shrimp, which, for some 71 years, had been the conventional practice (Findings 14-17, 20; Res. App. pp. 5a, 6a). Moreover, the Court, in setting forth the advantages and results of the subject inventions in Finding 21 (Res. App. p. 6a) expressly related the same not to respondent's machines, but to the "inventions . . . embodied" in those machines.

The Court's concern with the claimed combinations is further confirmed by the express findings of the Court that the claimed combinations were also present in the petitioners' machine (Skrmetta machine—Findings 36-38, 50; Res. App. pp. 10a, 20a) and that these claimed combinations as used in petitioners' machine operated to produce the same functions and results (Finding 42; Res. App. p. 12a) and that to the extent that the results were more favorable in petitioners' machine, the reason was that petitioners used the combinations of the patent claims to a greater extent than did respondent (Finding 42[f]; Res. App. p. 13a).

On the issue of validity, the District Court also gave the 36 prior art patents finally advanced by petitioners detailed consideration and expressly found with respect thereto that petitioners invariably advanced mosaiclike combinations chosen from combinational permutations thereof and that such required "alteration or change of the machine shown in each patent often to the point of destruction or loss of identity"; that there was no reason or evidence that would explain why a person of ordinary skill would so alter or change these prior art disclosures, and that petitioners' assertions were no more than a reconstruction of the claimed subject matter based upon hindsight and the disclosures of

the patents in suit (Findings 47, 48, 49; Res. App. pp. 16a, 19a).[1]

In concluding that the claims were valid, the District Court, *without reference to the presumption of validity* (Concl. 3; Res. App. p. 20a) properly measured the claims against the exacting standards of invention required for new combinations of old elements.[2] Finding 24 (Res. App. p. 7a) affirmatively sets forth the requisite production of both new functions and results by the "new combinations of the patent claims" and Finding 49 (Res. App. p. 19a) clearly shows that the claimed combinations were, *on the evidence,* not such as to be obvious to a person skilled in the art.

As to infringement, the only issues of consequence were whether the utilization of a belt roller to close the bottom of the peeling channel and a somewhat different shape of pressure finger were sufficient to avoid infringement (Finding 41; Res. App. p. 12a). With respect thereto, the Court found that "detailed and uncontroverted evidence—demonstrates that every element of each of the new combinations claimed by each of these claims is present in the accused Skrmetta machines unless infringement can be avoided by the differences between the machines as stated in Finding of Fact 41". Evidence of record on this latter subject included a comparison of the operation, functioning and results obtained from one of respondent's machines, *which embodied the new combinations covered by the claims in issue* (Findings 19, 17, 18; Res. App. pp. 6a, 5a) and one of the accused machines. As expressly set forth in Findings 38, 39 and 52 (Res. App. pp. 10a, 11a, 20a), the Court specifically found that the belt roller was a "roll within the

[1]The Court also found that peeling of shrimp involved singular problems different even from other types of crustacea (Finding 48 Res. App. p. 19a).

[2]35 U. S. C. 103. See *Great Atlantic & Pacific Tea Co.* v. *Supermarket Equipment Corp.*, 340 U. S. 147.

meaning of the claims" and alternatively, even if it was not considered to be a roll within the meaning of the claims, it was an equivalent, performing "the same work in substantially the same way" and accomplishing "substantially the same result", and that the difference in shape of the peeling finger did not avoid infringement. It is quite clear from the above noted findings, that the comparison which the Court made was not with respondent's machine but between the actions of the claimed combinations embodied in the respondent's machine with the actions of the combinations in petitioners' machine (Finding 42, opening paragraph; Res. App. p. 12a).

In light of the above discussed express and specific fact findings relating to the issues of invention and infringement, it is submitted that petitioners' factual assumption to the effect that the Court based its determination of such issues "*solely* on the success and operation" of respondents' commercial machine is wholly artificial and without support in the record.

The other assumptions in petitioners' Question 1 to the effect that the "commercial machine" is different in construction from the machine shown in the patent and that the "machine of the patent" was unsuccessful are equally erroneous and without substance. As to the asserted difference in construction between respondents' commercial machine and that described and shown in the patent, petitioners ignore completely the coincidence between such machines and the drawings and description of the '355 patent and the District Court's express fact findings 19, 17 and 18 (Res. App. pp. 6a, 5a) on the only material point involved, i.e., that respondents' machines embody "the new combination covered by the patent claims herein issue."[1] Likewise

[1] 35 U. S. C. 112 only requires that the description of the invention be such as to enable any person skilled in the art to make and use it and to set forth the best mode contemplated by the inventor for carrying out his invention. See *Smith* v. *Snow*, 294 U. S. 1 at 11.

the asserted lack of success of the machine of the patent is in complete derogation of the Court's express findings that respondents' machines, which embodied "the new combinations covered by the patent claims" (Finding 19; Res. App. p. 6a) were successful and received immediate and widespread acceptance (Findings 17, 25; Res. App. pp. 5a, 7a). Petitioners statement, even if limited to pre-1949 activities, is contrary to the evidence—compare R 717 and 720 with R 747 to 754. The exact machine illustrated in the '828 patent was successful on some types of shrimp (R 748). The exact machine illustrated in the '044 patent was even more successful (R 759); but the standards of these developers were high and they went further to the machine illustrated in Plaintiff's Exhibit 39 (R 751), which illustrates plaintiff's commercial machines and which machines embody all of the claimed combinations of the asserted claims of the three patents (See Finding 19; Res. App. p. 6a). Petitioners allege (Pet. 4) that no evidence was introduced that the "machine of patent '355" was ever constructed. This allegation disregards the fact that the machine shown in Plaintiff's Exhibit 39, which is the commercial machine, is, when considered pictorally, merely another view of the machine generally illustrated in the '355 patent and the '355 patent's specification is a description of the machine of Plaintiff's Exhibit 39.

Question 1 is wholly artificial and poses no issue properly presented or supported by the record in this case, nor do petitioners present any appropriate ground or reason for review thereof.

As to Question 2 (Pet. 2-3)

Question 2 defines no issue which could arise in this case. The question is predicated on an assumption of a "new use" and thus implies that the combination defined by the claims in suit are *old* as distinguished from *new*

combinations. This is the exact reverse of what was found by the District Court. That Court expressly found that the claimed combinations were *new* combinations of old elements (Finding 9, see also Finding 45; Res. App. pp. 3a, 15a), and that these *new* combinations produced new functions and new results.

Petitioners' question 2 is a misstatement of the findings. In their supporting argument (Pet. 16-20) petitioners continue to misstate the findings, even to the point of referring to a ". . . new use of an old device . . .", (Pet. 16), but the Court found the device, i.e., the combination, to be *new*. Petitioners compound this misstatement by implying that the District Court did not apply the standards reiterated in *Great Atlantic & Pacific Tea Co. v. Supermarket Equipment Corp.*, 340 U. S. 147. Such is also contrary to fact, as evidenced by Finding 24 (Res. App. p. 7a) which affirmatively finds the production of new functions and new results "in the new combinations of the patent claims here in issue" and clearly shows that the District Court applied the required exacting standards of invention to the claimed new combinations of old elements here involved.

The Court of Appeals, in affirming, reviewed the standards of invention applied by the District Court, citing *Pursche v. Atlas Scraper and Engineering Co.* (9 Cir. 1961), 300 F. 2d 467 and *Coleman Company Inc. v. Holly Mfg. Co.* (9 Cir. 1956), 233 F. 2d 71, in which the standard of invention re-enunciated in the *A & P Case* was applied and discussed.

Question 2 is wholly artificial and poses no issue properly presented or supported by the record in this case, nor does the petitioner present any appropriate ground or reason for review thereof.

As to Question 3

The artificiality of petitioners' Question 3 is so apparent that mere reference to the District Court's 52 detailed findings is a complete answer to the unacceptability of the question.

The Appellate Court below, in answer to the objection of petitioners, which is inherent in Question 3, stated:

> "The findings are detailed and complete in respect to prior art, time of invention, existence of competing machines and comparison of function: in short, novelty, utility and invention. The findings cannot be classed as 'mere conclusions' or 'sundry contradictory assumptions'. If anything, the findings of fact of the District Court could be characterized not as conclusory but rather as complete and detailed."

It is difficult to apprehend a basis for a different view.

In an effort to divert attention from the complete and detailed nature of the findings, petitioners first complain of the failure of the District Court to voluntarily characterize, or discuss in lay terminology, the detailed nature of the inventive advances contained in the subject patents (Pet. 6). Apart from the highly questionable relevancy of this assertion to the terms of the stated question, the fact is that the District Court, apparently mindful of the authoritative requirement that "the claims measure the invention"[1] expressly referenced its fact findings to the claimed subject matter of the patents in suit, wherein the inventive advances were, pursuant to the mandate of the statutes,[2] particularly and distinctly pointed out. See, for example, the express wording of Findings 2, 9, 17, 18, 19, 22, 23, 24, 36, 37, 38, 39, 44, 45, 48, 50.

[1] *General Electric Co.* v. *Wabush Appliance Corp. et al.*, 304 U. S. 364; *United Carbon Co.* v. *Binney & Smith Co.*, 317 U. S. 228.
[2] 35 U. S. C. 112.

Petitioners make a further specific effort in this regard and next complain that the District Court did not "discuss" the features of the prior art machines but commented *"only"* to the "general effect" that the prior art did not anticipate—, that these prior art machines were intended for picking or peeling products other than shrimp and that these prior patents did not teach successful shrimp peeling combinations" (Pet. 6-7), and follows with extracts taken out of context from the opinion of the Court of Appeals interspersed with argumentative comments, all to the end of creating the unstated impression that the District Court did not consider the evidence of record as to the prior art. The answer to this argument is the specific wording of Finding 47 (Res. App. p. 16a). This finding shows beyond question, the error of petitioners' assertions. See, also, Findings 48 and 49 and Finding 45 (Res. App. pp. 19a, 15a) which notes that petitioners withdrew the defense of anticipation.

We would comment no further on the obvious unacceptability of Question 3 were it not for the confusion inherent in petitioners' discussion of law in respect of this question (Pet. 20-27) which was obviously fathered by a lack of substance and conceived in basic misunderstanding of the pronouncements of this Court. Insofar as can be ascertained, petitioners' argument centers around the following two points:

1. An asserted erroneous interpretation of the *Esnault-Pelterie* decisions[1] to the effect that in patent cases "subordinate or circumstantial findings" are not required and an asserted conflict or split of authority between petitioners' self-serving misinterpretation of the *Esnault-Pelterie* decisions for patent cases and the

[1] *United States* v. *Esnault-Pelterie*, 299 U. S. 201 and 303 U. S. 26.

general criteria established relative to adequacy of fact findings as set forth in other Supreme Court decisions in non-patent cases and with decisions of the Seventh and Ninth Circuits.

2. Whether the assertedly inadequate findings here involved meet the general criteria as to adequacy of findings established in non-patent decisions of the Ninth Circuit.

Since point 1 does not bear any essential relation to the fact findings in this case, in contradistinction to point 2, these points will be separately treated.

(a) As to Point 1

Fundamental to petitioners' contentions is a misleading and erroneous assertion as to the interpretative effect of the *United States* v. *Esnault-Pelterie* decisions, 299 U. S. 201 and 303 U. S. 26, as set forth at the top of page 25 of the petition. Petitioners, by very careful wording, create the misleading impression that the quoted extract set forth at the bottom of page 24 of the petition is taken from an *Esnault-Pelterie* decision, *when in fact it is an isolated extract from a decision of the Seventh Circuit Court of Appeals.* Petitioners then rely upon such device in their erroneous assertion relative to the content of the *Esnault-Pelterie* decision.

The *Esnault-Pelterie* decisions related to direct review of Court of Claims cases in which, under the Act and Rules[1] then in effect, the findings were "required to be in the nature of a special verdict and specifically set forth the ultimate facts; the evidence is not brought up" (299 U. S. 201, 205). Under such circumstances and because of defendant's

[1] § 3(b) Act of February 13, 1925, 43 Stat. 939. 28 U. S. C. § 288. Rule 41, pars. (3), (4). As cited in ftn 10 on p. 205 of 201 U. S.

general traverse of the complaint, this Court noted in the first decision (299 U. S. 201 at 205-6) that

> "—the findings in order to be sufficient to sustain judgment for plaintiff must specifically decide questions of validity and infringement, and also include circumstantial facts sufficient to warrant the Court's conclusions in respect of the main issues."

The first *Esnault-Pelterie* decision also clearly shows that the Court of Claims had made numerous detailed or "circumstantial" fact findings but failed to make "specific findings upon the main issues" of validity and infringement and that the case was remanded with instructions to make specific findings as to whether the patent was valid and, if valid, infringed (299 U. S. 201, 206, 207). The Court of Claims then made the requisite addition specific findings that the patent was valid and infringed and certiorari was again granted (302 U. S. 668). On certiorari, this Court affirmed (303 U. S. 26) and discussed, at considerable length, the nature of the review that could be accorded under the Act and Rules then in effect which, as indicated earlier, *did not permit the bringing up of the evidence of record and confined review to questions of law* (see 303 U. S. 26 at 28-32).

We assert there is nothing in these *Esnault-Pelterie* decisions from which any intention or encouragement, interpretive or otherwise, could be inferred relative to the relieving of lower courts from making "subordinate or circumstantial findings". In fact, if interpretive inferences are to be drawn, the above quoted extract from the first *Esnault-Pelterie* decision, *supra* p. 11, would require a position contrary to that advanced by petitioners.

Petitioners arrive at their misconstruction and misinterpretation of the *Esnault-Pelterie* decisions by asserting the existence of an "uncertainty" in the Seventh Circuit

and rely upon *dicta* in three isolated decisions in support thereof. Actually, none of these cases involved any issue of adequacy of findings. Specifically the quoted extract (Pet. 24) from the *Enterprise*[1] case followed an express reversal of a lower court holding of patent validity on the stated ground that the patented subject matter would have been obvious to a person of ordinary skill in light of two specifically discussed prior art patents. The cited *Galland*[2] decision (Pet. 24) does not state, or anywhere indicate, that it was *"only"* necessary to find "the ultimate facts of invention or discovery, authorship, novelty and utility". The *Galland* decision, which overturned a lower court holding of patent validity, was "based" on the *Esnault-Pelterie* decision only insofar as the following rule was concerned (142 F. 2d 700, 704):

> "In that case (Ed.—the second Esnault-Pelterie decision 303 U. S. 26), the Court further stated that it was 'not unmindful of the rule that where, with all the evidence before the court, it appears that no substantial dispute of fact is presented, and that the case may be determined by a mere comparison of structures and extrinsic evidence is not needed for purposes of explanation or evaluation of prior art, or to resolve questions of the application of descriptions to subject matter, the questions of invention and infringement may be determined as questions of law.'"

The quotation appearing on the bottom of page 24 of the petition is taken from the cited case of *Harley C. Loney Co. et al.* v. *Ravenscroft et al.* (7 Cir. 1947) 162 F. 2d 703 at 704 and not, as can be readily inferred from the lead-in

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[1]*Enterprise Railway Equipment Company* v. *Keystone Railway Equipment Company* (7 Cir. 1959) 267 F. 2d 102.

[2]*Galland-Henning Mfg. Co.* v. *Logemann Bros. Co.* (7 Cir. 1944) 142 F. 2d 700.

sentence thereto, from an *Esnault-Pelterie* decision.[1] The quotation is pure dicta and no authority whatsoever is cited in support thereof. In fact, the decision does not anywhere cite or mention the *Esnault-Pelterie* decisions and, insofar as respondent can ascertain, the decision has never been cited as authority in any other reported decision on the quoted proposition that evidentiary facts "need not be incorporated in the findings of fact".

As will be now apparent, the interposition of the *Esnault-Pelterie* citation intermediate the terms "former" and "latter" in the lead-in sentence to the quoted extract from the *Loney* decision creates the misleading and erroneous impression that the quoted extract comes from one of the *Esnault-Pelterie* decisions, an impression furthered by the careful wording of the italicized portion of the paragraph at the top of page 25 of the petition and its direct coupling to the thereafter cited *Esnault-Pelterie* decision. Actually, only the quoted portion of the italicized material, i.e., "subordinate or circumstantial findings" is from the second *Esnault-Pelterie* decision and even in that decision such quoted material is utilized in an entirely different and unrelated context (as to be seen in the quote appearing at the top of page 23 of the petition). The issue posed by petitioners at the top of 25 of the petition is thus wholly without foundation and its presentation under these circumstances underlines the artificial nature of the petition.

The alleged decisional conflict or split of authority asserted by petitioners relative to the criteria for adequacy of fact findings in patent and non patent cases does not exist. As stated by this court in *Kelley et al.* v. *Everglades Drainage District*, 319 U. S. 415 at 419 and 420:

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[1]The Official Report citation thereto, i.e., 340 U. S. 147 appearing on page 24 of the petition and at page *v* in the table of cases thereof is erroneous and only further adds to the misleading nature of the assertions made.

> "The nature and degree of exactness of the findings required depends upon the circumstances of the particular case."

and

> "There must be such subsidiary findings of fact as will support the ultimate conclusion reached by the Court."

As to the general criteria of the Seventh and Ninth Circuit Courts of Appeals, a comparison of the language quoted from *Irish* v. *United States* (9 Cir. 1955) 225 F. 2d 3 by petitioners at pp. 25-6 of the petition with the language of *Maher et al.* v. *Hendrickson et al.*, (7 Cir. 1951) 188 F. 2d 700 at 702 and of *In re Rockford Baseball Club Inc.*, (7 Cir. 1953) 201 F. 2d 685 at 686 shows essentially complete identity and destroys any assertion of conflict.

There is thus no merit to petitioner's assertion that a conflict or split of authority exists as to the criteria for adequacy of findings in patent cases.

(b) As to Point 2

The specious nature of petitioners' contentions as to the adequacy of the particular findings in this case and standards of invention applied by the lower courts are fully met by mere inspection of the findings themselves and by our previous commentaries relative thereto, *supra* p. 3 et seq. Petitioners' concluding remarks (Pet. 27) relative to recent Ninth Circuit decisions are without merit. In fact the Appellate Court below, as evidenced by its opinion on rehear-

ing and by the footnotes thereto, specifically considered three of the four cases cited by petitioners.[1]

Petitioners' Question 3 is without merit, both in fact and law, and it does not state any issue presented or supported by the decisions and findings below. Nor does the petition present any appropriate ground or reason for review hereof.

There Exists No Ground or Reason Why the Writ Should be Granted.

1. As indicated above in our response to the specific questions, the questions presented are entirely artificial in nature and fail to state or define issues properly presented or supported by the record, decisions or findings below.

2. The mere pendency of other litigation on the patents here involved raises no compelling reason why the Court should, in the absence of a conflict of decision and in the absence of a substantial and important question, act to afford a *de novo* review of the concurrent findings and conclusions below. In conjunction therewith, petitioners' remarks concerning Judge West require comment.

   As of the present time, Judge West has not received any evidence or made judicial determination on any point of *res judicata*, nor has he expressed any judicial

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[1] i.e., *Hycon Mfg. Co.* v. *H. Koch & Sons* (9 Cir. 1955) 219 F. 2d 353; *National Lead Co.* v. *Western Lead Products Co.* (9 Cir. 1961) 291 F. 2d 447; *Welch Co. of California* v. *Strolee of California Inc.*, (9 Cir. 1961) 290 F. 2d 509.

The remaining case cited by petitioner, *Hayes Spray Gun Co.* v. *E. C. Brown Co.*, (9 Cir. 1961) 291 F. 2d 319 involved reversal of a lower court holding of invalidity and a remand for "further proceedings below consonant with this opinion, which opinion included some comments relative to inconsistency between findings (p. 321) and to the inadequacy of the findings to support the lower court's conclusion (now reversed) of invalidity.

opinion on the subject. In a preliminary pre-trial conference, attended only by counsel and in chambers, Judge West in the course of ordinary inquiry of counsel extemporaneously stated that he was not sure that one counsel had a correct view of a legal theory. No authorities and no evidence was discussed. As to petitioners' remarks concerning the present experience of Judge West with a particular branch of the law, we are aware of no instance where this Court has considered the experience of a particular member or bench of the judiciary as a reason to deny or to grant a writ of certiorari.

3. With respect to the pending FTC complaint, petitioners' failure to caption and identify the action permits him to take some liberties as to the parties thereto and the nature of the action. Respondent here is not the respondent in the FTC action.[1] The complaint in that proceeding is brought pursuant to Section 5 of the Federal Trade Commission Act (15 U. S. C. 45) and the gist of the unproven allegations of such complaint is the commission of allegedly unfair acts of competition and an alleged conspiracy to commit allegedly unfair acts of competition. If any allegations of the complaint were proven, the existence of the allegedly unfair acts would not be affected by the validity or invalidity or infringement of any patent owned by the Peelers Co., including those here in suit.

4. No conflict or split of authority exists as to adequacy of findings in patent cases and requisite compliance with Rule 52(a) of the Federal Rules of Civil Procedure (*supra* p. 11 *et seq.*), nor does this case depart from recognized decisional law as to the relevancy of prior

[1]Some of respondents partners are involved. Respondent is a partnership in commendam under Louisiana law and as such has legal identity apart from any partner.

art patents or the standards of invention applicable to new combinations of old elements (*supra* pp. 5, 8). The failure of the petition to set forth the facts accurately and the inaccuracies in stating the facts concerning the alleged "split of authority" relative to compliance with Rule 52(a) of the Federal Rules of Civil Procedure merit denial under Rule 23-4 of this Court.

CONCLUSION

The petition for writ of certiorari fails to assert or show any reason which should move this Court to review the carefully considered concurrent findings and decisions of the tribunals below.

The petition is without merit and should be denied.

Respectfully submitted,

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APPENDIX

Findings and Conclusions

[TITLE OF DISTRICT COURT AND CAUSE.]

This action having come on for trial before the Court without a jury, the parties having been represented throughout the trial by counsel, and the evidence and testimony of the witnesses having been fully reviewed in detail by the Court, and counsel for the parties herein having submitted exhaustive briefs on the facts and on the law applicable to this cause, the Court finds under the circumstances that an analysis of the facts and an extended discussion of the applicable law would serve no useful purpose. In view of the foregoing the Court hereby makes the following Findings of Fact and Conclusions of Law:

FINDINGS OF FACT

1. This is an action for infringement of certain designated claims of three patents owned by plaintiff. The action is brought under the patent laws. Jurisdiction and venue of the courts are admitted.

2. The patents in suit and the claims of each here in issue are as follows:

United States Patent No. 2,429,828 (hereinafter called the '828 patent) which issued October 28, 1947, to plaintiff's predecessor on an application filed July 25, 1944, by the patentees, Fernand S. and James M. Lapeyre. Claim 1 of this patent is in issue and infringement of this claim is admitted by defendant.

United States Patent No. 2,574,044 (hereinafter called the '044 patent) which issued November 6, 1951, to plain-

tiff's predecessor on an application filed April 1, 1946, by the patentees, Fernand S. and James M. Lapeyre. Claims 1, 2, 3, 4, 5, 6, 12, 17 and 18 are in issue and infringement of these claims is denied by defendant.

United States Patent No. 2,537,355 (hereinafter called the '355 patent) which issued January 9, 1951, to plaintiff's predecessor on an application filed December 9, 1947, by the patentees, Fernand S., James M. and Emile M. Lapeyre. Claims 1, 2, 3, 4, 5, 6, 7, 9, 11, 12 and 19 are in issue and infringement of these claims is denied by defendant. Claim 10, originally in issue, was withdrawn by plaintiff because of lack of satisfactory proof of infringement.

3. In addition to its denial of infringement of the patent claims herein issue, defendant challenges the validity of those claims on stated grounds, and additionally, purports by its counterclaim, under the provisions of Title 28 USC Secs. 2201, 2202, to challenge the validity of claims 2 to 7 of the '828 patent, claims 7 and 8 of the '044 patent and claim 10 of the '355 patent. Plaintiff has admitted that these additional claims are not infringed by the accused devices and consideration of the validity of these claims does not appear necessary to any justiciable issue between the parties.

4. Plaintiff, a Louisiana partnership, is the successor of a corporation formed in January, 1949, and dissolved in November, 1951, to manufacture and lease shrimp peeling machines.

5. Defendant, an individual, is a fish and sea food processor and a canner of shrimp formerly doing business as the Kaakinen Fish Company at Westport, Washington.

Findings and Conclusions

6. The devices here accused of infringement are two so-called "Skrmetta" shrimp peeling machines which, seriatim, were owned by defendant and John E. Close and operated by defendant. The first of such machines was installed in defendant's plant for a period of about five months during which period it was used 27 days in the peeling of shrimp. Thereafter it was returned to the seller. The second of such machines was installed in defendant's plant from August to October, 1958, during which time it was used in the peeling of shrimp on 12 days. The difference between the two machines principally resides in the fact that in the second machine pressure fingers were used throughout, whereas in the first machine pressure fingers were used in only the first two sections.

In October, 1958, the second machine, bearing manufacturer's name plate identifying said second machine as "Model 100-D, Series 1327," was shipped by defendant and John E. Close to Alaska, where it was installed and is operated for the joint benefit of its users and owners, in this matter it appearing that said users and others are controlled by and/or in privity with defendant and John E. Close, or either of them.

7. Prior to, and during, the time that defendant used the accused Skrmetta machines, defendant was a lessee of two of plaintiff's shrimp peeling machines.

8. Defendant had notice of his infringement of each of the patents in suit.

9. The inventions covered by the patent claims here in issue are new combinations of elements which elements, considered singly, are generally old. Shrimp peeling machines embodying these inventions were the first machines

ever successfully used in the automatic bulk peeling of shrimp in shrimp canneries.

10. The shrimp industry produces eleven types of shrimp products, including canned shrimp. Today the largest percentage of the shrimp fished in the United States is produced as two types, fresh headless and frozen headless, neither of which is peeled.

11. In 1930 approximately 82 per cent of the entire shrimp catch was produced as canned shrimp. By 1940 only 60 per cent of the catch was canned. By 1950 only about 30 per cent of the shrimp catch was produced as canned shrimp. In 1956, the year in which the production of canned shrimp started in the Northwest, the shrimp canned represented only about 15 to 16 per cent of the total catch.

12. The production of canned shrimp is an old industry, dating from about 1878. From that year to date shrimp canning operations have been conducted in the Gulf Coast area and have spread over much of that area. Beginning in 1956 commercial fishing for shrimp for canning purposes was gotten underway in the Pacific Northwest Coastal area. Canning operations started in the Northwest in 1956 and later spread to Alaska.

13. In general the total amount of shrimp canned in the United States has not varied widely from an average of about 900,000 cases yearly. In the decade 1921 to 1930 the average was about 826,000 cases. In the period 1931 to 1942 the average was somewhat over 1,000,000 cases yearly. From 1943 through 1949 the canned pack was at a level of but about 600,000 cases yearly. In the period 1950 to 1958 the former level of about 900,000 cases yearly was again reached.

Findings and Conclusions

14. As a necessary preliminary step in the canning of shrimp meat, the meat must be divested of its shell, head and other appendages. From the inception of the shrimp canning industry in 1878 up to a time in 1949, this had been done by hand, the operation being called "peeling" or "picking."

15. The operation of "peeling" or "picking" shrimp by hand required a large number of workers. A single worker would only peel from 210 to 420 pounds of raw shrimp a day, the smaller shrimp requiring more working time to peel than the larger shrimp. The efficiency of the workers decreased through the working day, their continued attendance was difficult to control, they often failed to remove all the edible meat from the shell with consequent loss to the cannery in raw material; they also often down graded the value of the shrimp by shortening the meats and, in addition, they often refused to peel the smaller shrimp.

16. Prior to 1949 attempts had been made to design machines for the peeling of shrimp, but no successful machines were devised and the canneries continued to employ workers for the hand peeling of shrimp.

17. In about May of 1949, plaintiff's predecessor offered to the industry shrimp peeling machines embodying the inventions covered by the claims of the patents in suit. By the end of 1949 ten of these machines had been leased in the United States. By the end of 1953 fifty-seven of such machines had been leased. By the end of 1956 ninety-three such machines were on lease in the United States. As of the time of trial, 124 such machines were on lease in shrimp canneries in the United States.

Findings and Conclusions

18. In any particular, important to the subject of whether or not plaintiff's machines embody the claimed inventions of the patents in suit, all of the shrimp peeling machines built and leased by plaintiff may be considered as a single machine.

19. The shrimp peeling machines leased by plaintiff are all alike and all embody the inventions of the patents in suit, the new combinations covered by the patents claims here in issue.

20. Once developed and offered to the canneries in 1949, plaintiff's machines have, since that date, virtually eliminated hand peeling in the shrimp canneries.

21. The inventions of the patents in suit embodied in plaintiff's peeling machines resulted in the obtainment of various advantages including new results and functions over those previously obtained by the use of hand peeling—those advantages included:

(a) Eliminations of difficulties and uncertainties caused by the unreliability of the hand workers and their decreasing efficiency caused by fatigue;

(b) A considerable saving in labor;

(c) An increased yield over that obtained by hand peeling;

(d) An upgrading of the shrimp caused by a production by the machines of larger sized grade of shrimp over that obtained in hand peeling with consequent rewards, as to price, to the canners;

(e) A constant flow of activities in canning operations; and

Findings and Conclusions

(f) An increased market for the fishermen for the smaller sized shrimp which had previously not been marketable to the canners because of the hand workers' aversion to the handling of such shrimp.

22. The new combinations covered by the patent claims here in issue overcame problems of long standing in the shrimp peeling art.

23. Previously proposed machines for automatically peeling large volumes of shrimp were unsuccessful and plaintiff's new combinations covered by the patent claims here in issue succeeded where others had previously failed.

24. The new combinations of the patent claims here in issue produced new functions and new results in the peeling of shrimp; the elements of these combinations are so arranged and so co-operate as to perform functionally more than the mere elimination of hand labor.

25. The success of plaintiff's machines embodying the new combinations was substantial and immediate. Defendant's contention that at least a portion of this success is due to structural detail improvements embodied in inventions claimed in a later patent owned by plaintiff, No. 2,778,055, application for which was filed some two years after the success had its inception, is not supported by the evidence.

26. The inventions of the patents in suit are primary and pioneer inventions in the art of shrimp processing.

27. The introduction of the machines embodying the inventions of the patents in suit was attended by three dis-

advantages, viz., a temporary displacement of labor, the loss of a certain amount of color in the shrimp, and a slight abrading of the surface over that encountered in hand peeling. The latter two disadvantages were accepted by the canners and did not become factors since practically all of the canners used the peeling machines.

28. The advantages which arose by reason of the use of the inventions of the patents in suit in the peeling of shrimp had all been achieved, and in the canneries hand peeling was a thing of the past, at the time that the accused Skrmetta machines were introduced.

29. The shrimp species most commonly canned in the United States vary with locality, the three common species of the Gulf and Atlantic areas being different from the six common species of the Pacific Coast area. The size of the raw shrimp also varies between the two areas, the Pacific Coast raw shrimp running, generally, about twice as many to the pound as the average raw shrimp taken from the waters of the Gulf area.

30. Canned shrimp meat is described by terms denoting size as follows:

Colossal—Less than 2½ shrimp meats per ounce.
Jumbo—Less than 3½ shrimp meats per ounce.
Large—5 or less shrimp meats per ounce.
Medium—More than 5 to 9 shrimp meats per ounce.
Small—More than 9 to 17 shrimp meats per ounce.
Tiny—More than 17 per ounce.

Those shrimp meats canned on the Northwest Coast, including Alaska, are almost entirely tiny although a few

small and medium have been canned. The size of the shrimp meat controls to a degree the price which the canner can obtain for his product, the price being higher as the shrimp increase in size.

31. In cannery operations the yield of shrimp meat is generally defined as the number of cans of canned shrimp which are obtained from a given unit of raw shrimp as received from the sea. Yield is affected by the species of shrimp being canned, the length of time the shrimp has been held out of water (called the "age" of the shrimp) the method of handling of the shrimp prior to the time they reach the cannery, the icing of the shrimp, the method of handling in the cannery, the peeling practices, the blanching procedures, and the packing procedures. The yields vary between plants, within a single plant, and, as to a given specie, within a single season depending upon maturity and the waters in which the shrimp is caught.

32. The variation of yield resulting from the species of shrimp which is being canned is the result of several matters. Very definite variations occur because of differences in the size of the head and/or the cephalothorax between one species and another, also the thickness of the shell of one species as compared to another. Probable differences also result by reason of differences in the amount of moisture carried in the meats of the different species or because of the relative amounts of proteins and minerals in the meat of one specie as compared to another.

33. The yield of shrimp meat obtained in canning operations vary in the various sections of the United States where canning operations take place. On the Gulf Coast the yields are from 28 to 37 per cent, on the coasts of Oregon and Washington, the yields are 17 to 18 per cent.

on the Alaskan Coast the yields are presently 10 to 20 per cent.

34. The quality of canned shrimp includes such factors as color; texture; freedom from broken shrimp; freedom from pieces of hull or shell, swimmerettes, antennae and various portions of the anatomy of the shrimp other than the meat itself. Quality can be affected by washing, peeling, deveining, blanching, grading, sealing, processing and cooling operations in the cannery.

35. A "whole" shrimp meat is one which has sufficient of its length that on blanching, it forms a "U." A "broken" shrimp meat is a piece or section of the meat not of sufficient length to comprise a whole shrimp.

36. Infringement of claim 1 of patent '828 has been admitted by defendant.

37. As to the infringement of claims 1, 2, 3, 4, 5, 6, 12, 17 and 18 of patent '044 and of claims 1, 2, 3, 4, 5, 6, 7, 9, 11, 12 and 19 of patent '355, plaintiff's detailed and uncontroverted evidence as to the structure of the accused Skrmetta machines demonstrates that every element of each of the new combinations claimed by each of these claims is present in the accused Skrmetta machines unless infringement can be avoided by the differences between the machines as stated in Finding of Fact number 41.

38. The belt which defines the lower surfaces of the peeling channels in the accused machines is a roll within the meaning of the claims of patent '044 and patent '355. Viewed from its surface and considered as to its function it has all of the aspects of a roll. The fact that it is a belt encircling

two rollers does not change the fact that its functioning surface is that of a roller. This finding is indirectly supported by defendant's admission of the infringement of claim 1 of the '828 patent.

39. Alternatively, if the roller belt arrangement which closes the bottom of the peeling channels is not a roller within the meaning of that term as it is used in the claims of the '044 and '355 patents, it is, on all the evidence, the equivalent of a roller since it performs the same work in substantially the same way and accomplishes substantially the same result, although differing somewhat from a solid roller in form and shape.

40. Pursuant to an order of this Court, plaintiff's representatives visited the plant of defendant for three days in October, 1958, and there made extensive observations under comparable conditions as to the respective actions of one of the accused Skrmetta machines, the second machine, and one of plaintiff's machines in the peeling of shrimp. These observations included the taking and examination of samples by plaintiff's expert Strasburger. Present also at this inspection were defendant's employees, and others not of plaintiff's party who also took samples and made observations. Among these other persons was Raphael Q. Skrmetta. At trial, evidence was given by plaintiff's representatives as to matters observed. No other persons who had taken samples were called by defendant. Defendant himself was not called. Plaintiff's evidence as to the results of these observations is uncontroverted except insofar as the testimony of defendant's machine operator and foreman Grimes purports to controvert the testimony of the expert Strasburger as to the color and texture of the shrimp coming from the two

machines. Grimes made no comparison by sample, rejecting such procedure as technical.

41. The shrimp peeling machine of plaintiff and the second accused Skrmetta shrimp peeling machine observed in defendant's plant presents visual external differences in appearance, but the evidence shows that in respect to their active elements and the organization of those elements, they are substantially the same with these exceptions:

(a) The accused Skrmetta machine possesses over 50 per cent more effective length of shrimp peeling channels;

(b) The accused Skrmetta machine uses a belt roller, instead of the roller used in plaintiff's machine, to close the bottom of the peeling channel and to form with the upper rollers or insert rollers the parallel peeling nips of each channel;

(c) The shape of the pressure fingers, which assist in the peeling operation, is somewhat different in the accused machine than in plaintiff's machine.

On the latter two of these differences, defendant bases his argument that the combination of the accused machines is a different combination than those claimed in the advanced claims of the '044 and '355 patents.

42. From the evidence regarding the observation of the actions of the combinations embodied in the accused peeling machine and plaintiff's peeling machine in defendant's plant, the following matters clearly appear:

(a) The plaintiff's machine and the accused machine operate in the same manner in the peeling of shrimp.

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(b) From the standpoint of results there is little, if any, difference in the performance of plaintiff's machine and of the accused machines over equivalent length of peeling channels.

(c) Because of its longer lengths of peeling channel the Skrmetta peeling machine, as compared to plaintiff's peeling machine, produced more whole peeled shrimp, although the Skrmetta machine produced more broken shrimp.

(d) The yield of shrimp produced by the use of the Skrmetta machine and produced by the use of the plaintiff's machine was substantially the same.

(e) There is no difference in the color or the surface of shrimp peeled on the accused Skrmetta machines as compared to shrimp peeled on plaintiff's machines.

(f) Any difference in the results obtained by the accused Skrmetta machines, as compared with plaintiff's machine, is merely one of degree and is caused by the application in the Skrmetta machine of the inventions of the patents in suit to a greater degree than in plaintiff's machines.

(g) Defendant, in his use of the two machines in side by side operation, commingled the product of the machines and canned the commingled product.

(h) There is no acceptable evidence which supports defendant's position that the combinations used in the accused machines are different from, or not equivalent to, the combinations claimed in the claims of the '044 patent and the '355 patent under which infringement is here charged.

(i) The plaintiff has amply met its burden of proof in respect of infringement.

Findings and Conclusions

43. Despite the advantages and results obtained by the use of the inventions of the patents in suit, as embodied in plaintiff's machines, these machines as constructed by plaintiff, did not entirely dispense with hand labor. It was found that the machines would not entirely remove certain gristle from the shrimp and that some of the shrimp would not be completely peeled and would have appendages such as legs and swimmerettes adhering thereto, thus requiring a number of workers working after the machine to clean up some of the shrimp. In or about April 21, 1951, after twenty-six of plaintiff's machines had been leased, plaintiffs offered the users of its peeling machines a supplementary machine known as a "cleaner" to receive the shrimp coming from the peeling machine. This "cleaner" functioned to remove the "gristle" and to complete peeling which was not completed in the peeling machine. Since about the middle of 1951 all of plaintiff's peeling machines have delivered their product to such a "cleaner."

The plaintiff's machines leased to defendant, and as used in defendant's plant, utilized such a cleaner and, in addition, a separator for the removal from the peeled product of trash. In defendant's plant the shrimp from plaintiff's peeling machine passed from that machine to the cleaner and was then elevated to the separator by means of a food pump. In defendant's plant the product of the accused Skrmetta peeling machine was not passed through a cleaner or through the trash separator. In respect of such matters, the uncontroverted evidence of the observations of the witnesses is to the following effect:

(a) The greater length of the peeling channels in the accused Skrmetta machine obviates the use of a cleaner with that machine;

Findings and Conclusions

(b) When the results of the Skrmetta peeling machine are compared with the results of the plaintiff's peeling machine and its adjunct cleaner, there is no difference observable except in the amount of trash in the product;

(c) The plaintiff's peeling machine and its adjunct cleaner in defendant's plant delivered the shrimp through a food pump to a separator, the purpose of which is to remove loose trash. When the shrimp which has passed through this line of equipment is compared with the shrimp from the accused Skrmetta machine the only differences observable are more trash in the Skrmetta machine product and more broken shrimp in the product from the separator. The reason for the greater amount of trash in the Skrmetta machine product was because it was not passed through a separator. The reason for the greater amount of broken shrimp in the product from plaintiff's peeling machine was that it had passed through the food pump.

(d) Food pumps such as used by defendant are not necessary to a shrimp peeling operation.

44. Claims 1, 2, 3, 4, 5, 6, 12, 17 and 18 of patent '044 and claims 1, 2, 3, 4, 5, 6, 7, 9, 11, 12 and 19 of patent '355 are infringed by the accused Skrmetta machines.

45. Defendant's asserted defenses under Title 35 U.S.C. Section 102 were withdrawn before trial. No prior art relied upon by defendant anticipates the claims of the patents in suit. No prior art or other evidence advanced by defendant challenges or negates the fact that the patentees named in each of the patents in suit were the first and original inventors of the inventions claimed therein.

46. Defendant's assertion that the '355 patent contains an inoperative and insufficient disclosure is not supported

by the evidence. The disclosure of the '355 patent is sufficient to enable a person skilled in the art to make and use the inventions therein described and claimed for the objectives and purposes therein stated.

47. For its defense as to the validity, based on lack of invention as such is defined by Section 103 of 35 U.S.C., defendant relies upon some thirty-six prior patents, most of which relate to machines for corn husking or harvesting, peanut or fruit destemming, coal or gravel screening, bean shelling, seed treating, nut blanching, and various other subjects. In building a mosaic-type defense based upon these 36 prior patents, defendant invariably combines two or more of them with each other or, in the case of the '355 patent, with the '828 patent which latter is the only reference relating to shrimp, fish or sea food processing on which defendant places reliance. From consideration of these various patents and related evidence, the following appears:

(a) Each patent relied upon by defendant represents a complete machine entity designed for a specific purpose;

(b) Defendant's theory of defense requires alteration or change of the machine shown in each patent, often to the point of destruction or loss of identity of such machine;

(c) No reason or suggestion is to be found in any of these prior patents of any reason for changing, altering, or otherwise adjusting the identity of the machines and combinations described therein;

(d) Considered as a group, these prior patents relate to arts remote from shrimp peeling and remote, in many cases, from each other and no evidence exists which would explain or suggest any reason why a person of ordinary skill in the art to which the inventions of the patents in

suit pertains, should change, alter or adapt the machines of these prior patents in any particular way;

(e) The defense advanced by the defendant on the basis of these prior patents is no more than a reconstruction of the combinations claimed by the patents in suit based upon hindsight and the disclosures of the patents in suit.

(f) Defendant during the course of this action has at one time or another cited and/or relied upon the following patents:

Inventor's Name	Pat. No.	Date	Title
Cutler	324	1837	Machine for Husking Corn
Doster	18658	1857	Corn Husker
Moulton	311199	1885	Meat Tenderer
Dexter	421681	1890	Machine for Blanching Almonds
Clark	544156	1895	Hop Picker and Cleaner
King	546891	1895	Screening Apparatus
Lasiter	746714	1903	Peanut Stemmer
Sells	640961	1900	Corn Husking Machine
Madsen	658408	1900	Corn Husking Machine
Van Ness	712982	1902	Corn Husking and Shredding Machine
Bellairs, et al.	734035	1903	Machine for Husking Corn
Reigle	759129	1904	Corn Husking Machine
Welsh	784907	1905	Corn Husking Apparatus
Nelms	829348	1906	Peanut Stemmer
Ruse	848497	1907	Corn Husking Machine
Steel, et al.	865445	1907	Machine for Stemming Peanuts
Hettrich	876802	1908	Corn Husking Machine
Coryell	878610	1908	Machine for Husking Green Corn
Shaffer	1011378	1911	Machine for Cleaning Clams and Other Fish
Keith	1071925	1913	Corn Husking Machine
Sells	1147756	1915	Corn Husker
Phelps	1157038	1915	Corn Husking Machine

Findings and Conclusions

Inventor's Name	Pat. No.	Date	Title
Kelly	1190554	1916	Feeding Mechanism for Nut Blanching Machine
Stone	1202117	1916	Corn Husker
Leister	1382792	1921	Corn Husking Machine
Barry	1415296	1922	Machine for Separating Flesh from the Skin and Bones of Fish
Cover	1458221	1923	Corn Husking Machine
Nelson	1458721	1923	Corn Husking Machine
Faehn	1490605	1924	Sprinkler for Corn Shredders
Bahr	1510578	1924	Fruit Stemming Machine
Hardie	1615081	1927	Pea Sheller
Cover	1627838	1927	Corn Husking Machine and Method
Ayars	1635569	1927	Vegetable Topping Machine
Flamm	1697525	1929	Onion Topper
Warren	1703048	1929	Seed Treating Machine
Triplett	1703123	1929	Grape Stemming Machine
Stansbury	1835190	1931	Machine for Operating on Fruits and the Like
Farley	1852405	1932	Fruit Washer and Drier
Sells, et al.	1990503	1935	Corn Husking Machine
Nuttleman	2001351	1935	Corn Husker
Bottker	2034691	1936	Shrimp Shelling Machine
Knight	2037661	1936	Green Corn Husking Machine
Sanborn	2048470	1936	Grape Stemmer
Hitchcock	2087717	1937	Corn Husker
Bottker	2147633	1939	Shrimp Shelling Machine
Stelter	2202540	1940	Corn Husking Machine
Grayson	2263697	1941	Machine for Deveining and Removing the Shells from Shrimp
Fox	2335588	1943	Feed Valve for Continuous Cookers
Crawford	2362356	1944	Fruit Husking Machine
Richardson	2380264	1945	Cinder Draining and Disposal Plant

Inventor's Name	Pat. No.	Date	Title
Barrett, et al.	2414922	1947	Onion Topping Device
Lapeyre, et al.	2429828	1947	Shrimp Peeler
Daub	2524519	1950	Machine for Removing Pods from the Seed of Wax Beans or the Like
Roshko	2660754	1953	Crayfish Picking Machine
Lapeyre, et al.	2778055	1957	Machine for Peeling Shrimp

48. The evidence is contrary to defendant's theory of lack of invention based upon the thirty-six references relied upon by defendant. There is no evidence of any reason for the defendant's synthesis of the claimed combinations of the patents in suit from these various references except defendant's following of the teachings of the patents in suit. On the other hand, the evidence shows that the peeling of shrimp involves specific problems different from even other types of crustacea and that the earlier workers in the shrimp peeling art, such as the patentee Bottker and the patentee Grayson, patents on which defendant first relied and then later withdrew, did not teach successful shrimp peeling combinations despite the availability to these patentees of most of the prior patents on which defendant relies.

49. The patentees of the patents in suit were the first to combine known elements into the new combinations in order to achieve the particular unitary results obtained by these combinations and the weight of the evidence is contrary to the defendant's theory that a person skilled in the art would, in the absence of the teaching of the patents in suit, reach the same result by combining and altering the disclosures of the prior patents.

50. The accused Skrmetta machines are not copies of the prior patents on which defendant relies, but are copies of the new combinations claimed in the patents in suit.

51. The patents Nos. 2,537,355 and 2,574,044 are patentably distinct from each other.

52. The difference between plaintiff's machine and the accused machines in the shape of the pressure fingers, which assist in the peeling operation, does not avoid infringement by defendant.

Conclusions of Law

1. The asserted claims of the patents in suit relate to new combinations which are true and patentable combinations.

2. The defense of double patenting as advanced by defendant in this case must be denied because the patentees of the '044 and '355 patents are different and the claims in question express inventions which are patentably distinct from each other.

3. The conclusion that the asserted claims of the patents in suit are valid is reached on the evidence in this case and without reference to the presumption of validity arising by legislative fiat from the issuance of the patents in suit. Consideration of the prior patents in evidence and other defenses as to validity in the light of the history of the proceedings in the Patent Office leading to the grant of the patents in suit reveals that there was no material matter as to validity before this Court of which the Patent Office was not aware. The prior art patents in evidence relied upon

by defendant are, in effect, the same as, or of no greater pertinency, that the prior patents in evidence considered by the Patent Office.

Done in Open Court this 11th day of April, 1960, at Seattle, Wash.

s/ GEORGE H. BOLDT,
United States District Judge.

Presented in behalf of plaintiff by

FORD E. SMITH,
Of Counsel.

Certificate of service acknowledged.
[Endorsed]: Filed and entered April 11, 1960.